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No. 84-233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner
v.
IRL SHUTTS, *et al.*,
Respondents

Petition for a Writ of Certiorari to the Kansas Supreme Court

BRIEF AMICUS CURIAE OF AMOCO PRODUCTION COMPANY IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. May a state court in a nationwide class action, consistent with the due process clause, assert jurisdiction over unnamed class members whose transactions arose entirely in other States and who are non-residents, neither having contacts with the forum nor having affirmatively consented to the forum's jurisdiction?

2. May a state court in a nationwide class action, consistent with the due process and full faith and credit clauses, apply its own law to transactions to which the forum has no connection, occurring between non-residents in other States?

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INTEREST OF AMICUS CURIAE

Amoco Production Company (Amoco) is a defendant in a nationwide class action suit brought by a single natural gas royalty owner in a state court of Kansas. Like the instant litigation (*Shutts II*), the class action against Amoco involves natural gas properties in ten States, albeit significantly more of the transactions (around 33% of the leases, but less than 20% of the money) have a Kansas connection. Like petitioner Phillips Petroleum, Amoco did not forward royalty payments related to nationwide price increases until it was certain that rates under the Natural Gas Policy Act of 1978 were not subject to refund. Once the price increases were finalized, Amoco promptly forwarded the accrued (suspense) royalties.

Unlike Phillips, Amoco made no attempt to withhold interest on the suspense royalties. Amoco forwarded to its royalty owners not only the suspense royalties, but

also interest based on the applicable statutes of the States in which the leases are situated.

Because the Kansas Supreme Court had previously indicated a willingness to hear nationwide class action suits under somewhat similar circumstances and apply Kansas law both to the applicable rate of interest and to whether interest on interest was payable, *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*), the class suing Amoco alleges that additional payments, based on Kansas law, not local law, are due to members of the class. This suit, *T.A. Dudley v. Amoco Production Company*, Case No. 80 C 34 (26th Judicial District Court, Stevens County Kansas) is currently at the class notice stage. Based on *Shutts I* and the instant case, *Shutts II*, there is every reason to believe that despite the fact Amoco forwarded the applicable interest to its royalty holders and Phillips did not, the rule in *Shutts II* will be applied to the approximately $6 million in suspense royalties having no connection with Kansas (beyond the fact of the litigation).

ARGUMENT

The instant case involves the twin plaintiff juggernauts of (1) a nationwide class action where the vast majority of the class members have *no* contact whatsoever with the forum and (2) pure forum shopping choice of law selection. Separately each raises substantial problems. *Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E. 2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). In tandem their effect is devasting, guaranteed to produce unexpected, unprincipled, and unconstitutional results.

The importance of the nationwide class action issue has already been recognized by this Court. The decision below, *Miner*, *Stutts I*, and others like them have flatly stated that *International Shoe Co. v. Washington*, 326

U.S. 310 (1945) is limited to defendants only and that recent decisions emphasizing the importance of that case's minimum contacts rationale are similarly limited. Not unnaturally State courts are divided on such an important jurisdictional question affecting the entire Nation. Thus this Court granted certiorari in *Miner* to decide this important issue. After briefing and oral argument, *Miner* was dismissed for want of a final judgment. 459 U.S. 86 (1982). No such problems exist here. Furthermore, even if the judgment in *Miner* had been final, the instant case is a vastly superior vehicle to *Miner* for plenary review because the decision below illuminates a further danger of the nationwide class action: in order to make such suits manageable a forum may choose to apply its own law to transactions whose sole connection with the forum is the presence of unnamed non-resident plaintiffs who do not opt out.

Shutts II, like *Miner*, concluded that *International Shoe* does not govern the question of whether jurisdiction could be obtained over non-resident, non-responding plaintiffs having no contacts with the forum. But then *Shutts II* goes well beyond *Miner*, which had held that sub-classes would be necessary depending on differing local laws,[1] by concluding that Kansas law would govern all transactions, wherever occurring, because the named plaintiffs[2] had selected Kansas as the forum.[3] Only "compelling" reasons can change this and the court need not—and apparently will not—look for them. Kansas has thus concluded that it has the power to police transactions in

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[1] If "the trial court finds that such subclasses of laws may be made, then the common question of fact will necessarily prodominate [sic] and the statutory requirement will be satisfied." 428 N.E.2d at 484.

[2] Or plaintiff, as is the case in the *Dudley* litigation.

[3] *Shutts I* foreshadowed this when the court chose to apply Kansas interest law to suspense royalties involving certain counties in the Hugoton-Anadarko Basin of Texas, Oklahoma, and Kansas (albeit the largest area of the basin is in Kansas).

Texas, Oklahoma, and Louisiana (to take just the three States most involved with the substantive question of interest on suspense payments) and bind those States to Kansas law even though it would have been impossible for the leasing parties at the time the leases were executed to foresee such a result and even though the laws of the other States would produce different results. It is easy to demonstrate that in our federal system the Kansas result can not stand.

As the plurality in *Hague* noted, "a State which has had no significant contact or significant aggregation of contacts, creating state interests with the parties and the occurrence or transaction" may not impose its rule on others. 449 U.S. at 308. Just what are the Kansas interests? First, and legitimately, Kansas has a strong interest in protecting Kansas residents. Second, and equally legitimately, Kansas has a strong interest in policing transactions in Kansas regardless of the residency of the parties. But these two strong interests account for less than 3% of the entire suit. The court below brought in the other 97%—despite a total lack of contacts with the forum—with two more alleged interests. The first added interest was adjudicating claims of class members having no contact with Kansas beyond this case because they had the desire to see Kansas law applied to their transactions. The second was the fact that the defendant does business in Kansas.[4]

These two additional interests are simply insufficient under *Hague* to authorize displacement of the laws of the

[4] The latter point was buttressed by statements concerning a "common fund," a legal fiction used to shore-up both the jurisdictional and choice of law conclusions. Apparently the "common fund" then justifies the bootstrap that since Phillips is in Kansas, it follows naturally that the "common fund" is too. Why this fiction assists the Kansas choice of law conclusion is unclear since one would expect that if the "common fund" exists it would be controlled not by the State of litigation, but by either the law of the State of incorporation or that of the State of principal place of business, Delaware and Oklahoma respectively.

States most interested in the transaction. Texas, Oklahoma, and Louisiana are major gas producing States with strong public policies governing the relationship of producer to royalty owner.[5] Indeed, following *Shutts I* the Texas Supreme Court has spoken to the very point of interest on suspense royalty payments and held that for Texas leases the Texas statutory rate of interest applies plus interest computed on the interest. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. Sup. Ct. 1978). Oklahoma finds the subject of interest rates to be of such importance that it has a constitutional provision governing it. Oklahoma Constitution, Art. 14 § 2, implemented by 15 Okla. Stat. Ann. § 266 (1982-83 Supp.). Yet amazingly no Oklahoma court has been able to apply its constitution to the suspense royalty problem because all such Oklahoma litigation is now carried on in Kansas.[6] It is not only not compelling to displace the choices of the citizens of other States on matters involving their significant internal industries, it is unconstitutional.[7]

[5] Incredible as it seems when contrasted with the result reached, the Kansas Supreme Court understands precisely this point when the affected State's name is Kansas:

> "While [the Kansas royalty owners] may constitute only a small percentage of the total number of class members, this state has a significant interest in protecting the rights of these royalty owners both as individual residents of this state and as members of this particular class of plaintiffs. Oil and gas production is a significant industry in this state. Kansas has an interest in ensuring that out-of-state oil and gas companies which do business within this state do not conduct themselves unlawfully or violate the rights of resident royalty owners to whom the company is responsible."

Shutts II, Petition for Certiorari at A28.

[6] Named plaintiffs Robert Anderson and Betty Anderson are Oklahoma residents and owners of Oklahoma leases. They had commenced litigation in Oklahoma but dropped it to join Irl Shutts, a Kansan (with leases in Oklahoma and Texas, but not Kansas), when he commenced the instant class action.

[7] See also *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). It would seem to follow *a fortiori* that if the interest of Texas in controlling

Could it be seriously asserted that Kansas could by legislation reach the same result as the Kansas Supreme Court reached? Suppose that after debate the Kansas legislature determines that it should police the suspense royalty practices in all 50 United States jurisdictions of oil companies doing business in Kansas. Accordingly it passes a statute requiring any oil company present within Kansas to conform all transactions involving suspense payments to Kansas law. At the outset it should be noted that the case for sustaining such a law is *greater* than in the instant case. As both *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *Kulko v. California Superior Court*, 437 U.S. 84 (1978) demonstrate, pursuit of a policy specifically declared by the legislature is entitled to more weight than pursuing generalized state interests nowhere found in relevant legislation. Yet even with the added backing of legislation it is inconceivable that Kansas could, consistent with the commerce, due process and full faith and credit clauses, impose its will on the citizens and legislatures of Texas, Oklahoma, and Louisiana. No matter how happy a resident of those States might be that Kansas was attempting to give him a more favorable law than the political process of his home State would, that could not constitute a legislatively valid interest for Kansas to act. Kansas simply lacks any interest in transactions occurring between non-residents, in other States, and affecting Kansas only by the presence of a plaintiff forum shopping for the best available law to govern his transactions.[8] The constitution contains limits on extra-

its oil and gas leases is sufficient to require abstention in a diversity case where the sole risk is misinterpretation of Texas law, the interest of Texas would preclude application of the law of any other State to such a transaction.

[8] Indeed if the class action aspect of this suit were stripped away, it is inconceivable that a Texas resident royalty owner under a lease executed in Texas covering oil and gas rights in Texas could enter Kansas and sue Phillips with the Kansas courts applying Kansas law. The desire of the plaintiff to win an otherwise losing case would not give Kansas cause to apply their law and neither would simple presence by an out-of-state company.

territorial reach. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Home Ins. Co. v. Dick*, 281 US. 397 (1930)

CONCLUSION

Gillette v. Miner involved an important issue, one that will be recurring constantly in state courts. Yet that decision involved no determination of manageability of the class (normally a point of state law). Here, by contrast, the Kansas Supreme Court has solved the manageability problem by the amazing determination that Kansas law governed all the transactions in the United States even though 97% of them lie beyond its borders and involve persons with no contacts with Kansas beyond the receipt of notice of the suit. This presents a major federal question. Obviously, if Kansas can do this on these facts then any other willing State can do the same in a different area. Respect for the sovereign determinations of sister States is hardly promoted by this aggressive parochialism. Even more than in *Miner*, the issues in this case warrant plenary treatment by this Court.

Respectfully submitted,

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